Supreme Court, U.S.
FILED

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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ADDISON JACK WORTHINGTON,

Petitioner,

versus

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT AND, RONALD L. POWELL,

Respondents.

On Petition For Writ Of Certiorari To The Second Circuit Court Of Appeal For The State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

Whether a state's grant to its citizens of the right to trial by jury, under the Seventh Amendment of the United States Constitution, confers upon this Court the power to review violations of that right.

Whether the Second Circuit Court of Appeal for the State of Louisiana violated petitioner's right to trial by jury, under the Seventh Amendment to the United States Constitution, when it:

a. Reversed a $2,025,000.00 jury verdict in favor of petitioner, who, as a passenger, was rendered a paraplegic in an automobile accident, factually determined by the jury to have been partially caused by the negligence and strict liability of the State of Louisiana, Department of Transportation and Development; and,

b. Particularly when the appellate court, in so doing, failed to follow the required legal analysis, under federal and state law, to justify a reversal of a jury's factual determinations.

Whether petitioner received a fair and impartial consideration in the Louisiana Supreme Court with respect to Applications For Writs Of Certiorari there filed; and, his Motion For Reconsideration And Recusal with respect thereto.

PARTIES TO THIS PROCEEDING

Addison Jack Worthington;

Tony Dean Mullins;

Charles Ray Whitaker;

Danny Powell;

State of Louisiana, Department of Transportation and Development; and,

Ronald L. Powell

TABLE OF CONTENTS

Page

Questions Presented For Review i

Parties To This Proceeding ii

Table of Contents iii

Table of Cited Authorities iv

Citations Of The Official And Unofficial Reports Of The Opinions And Orders Entered 1

Basis For Jurisdiction 1

Constitutional Provision Involved In This Case 2

Statement Of The Case 3

Narrative Of Facts 6

Summary Of Judicial Action 6

Assignments Of Error 9

Argument 9

Conclusion 24

TABLE OF CITED AUTHORITIES

Page

CASES

Arceneaux v. Domingue, 365 So.2d 1330 (La. 1978) 9

Basham v. Pennsylvania Railroad Company, 372 U. S. 699, 10 L.Ed.2d 80, 83 S.Ct. 965 (1963) 22, 23

Brown v. Department of Transportation and Development, 572 So.2d 1058 (La. App. 5th Cir. 1990) *writ denied*, 581 So.2d 710 (1991) 12

Campbell v. Department of Transportation and Development, 648 So.2d 898 (La. 1995) 12

Clement v. Frey, 666 So.2d 607 (La. 1996) 9, 21

Dill v. State Department of Transportation and Development, 545 So.2d 994 (La. 1989) 5, 20

Holmes v. DOTD, 466 So.2d 811 (La. App. 3rd Cir. 1985) *writ denied*, 472 So.2d 31 (1985) 12

Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916..... 22

Moon v. City of Baton Rouge, 522 So.2d 117 (La. App. 1st Cir. 1987) *writ denied*, 523 So.2d 1319 (1988) 16

Myers v. State Farm Mutual Automobile Insurance Company, 493 So.2d 1170 (La. 1986) 16

Perry v. Morgan Guaranty Trust, 521 F.2d 1378 (5th Cir. 1976) 23

Rosell v. Esco, 549 So.2d 840 (La. 1989) 9

Sinitere v. Laverne, 391 So.2d 821 (La. 1980)..... 21

Sistler v. Liberty Mutual Insurance Company, 558 So.2d 1106 (La. 1990) 10

TABLE OF CITED AUTHORITIES – Continued

Page

Stobart v. State, through Department of Transportation and Development, 617 So.2d 880 (La. 1993)..... 10

Worthington v. Vasa North Atlantic Insurance Company, et al., 687 So.2d 404 (La. 1997) *writ denied*, 691 So.2d 72 (La. 1997) *rehearing denied* 1

United States Constitution, Amendment VII 2

United States Constitution, Amendment X.....2, 3

FEDERAL AND STATE STATUTES

28 U.S.C. §1257..... 2

LSA-R.S. 48:35..... 21

L.S.A. C.C.P. Art. 1731..... 3

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED

1. Judgment rendered June 13, 1995. State of Louisiana, Parish of Union, Third District Court, *Addison Jack Worthington v. Vasa North Atlantic Insurance Company, Ronald L. Powell, and The State of Louisiana*, Docket No. 32,097.

2. Opinion, Court of Appeal, Second Circuit, State of Louisiana, *Addison Jack Worthington v. Vasa North Atlantic Insurance Company, et al.*, Nos. 28,638-CA; 28,639-CA; 28,640-CA; 28,641-CA; 28,642-CA, rendered October 30, 1996 – not designated for publication pursuant to Rule 2-16.3, Uniform Rules, Courts of Appeal, State of Louisiana.

3. Denial of Writ Of Certiorari. *Worthington v. Vasa North Atlantic Insurance Company, et al.*, 687 So.2d 404 (La. 1997), and other consolidated cases, No. 96-C-2869 on the docket of the Supreme Court of the State of Louisiana, rendered January 31, 1997.

4. Denial of Application For Rehearing And Motion To Recuse. *Worthington v. Vasa North Atlantic Insurance Company, et al.*, 691 So.2d 72 (La. 1997), and other consolidated cases, No. 96-C-2869 on the docket of the Supreme Court of the State of Louisiana, entered March 21, 1997.

I. BASIS FOR JURISDICTION

The appellate decision sought to be reviewed was rendered on October 30, 1996. Petitioner timely applied for a writ of certiorari to the Louisiana Supreme Court. The writ application was denied on January 31, 1997.

Petitioner timely filed an application for rehearing and motion to recuse which was denied on March 21, 1997.

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1257 which provides, *inter alia*, that final judgments or decrees rendered by the highest court of the state in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States. The denial of petitioner's Writ Of Certiorari by the Louisiana Supreme Court is a decree by the highest court of the State of Louisiana and thus, may be reviewed by this Court.

The Tenth Amendment of the United States Constitution reserved to the states powers not delegated to the federal government.

The State of Louisiana used this reservation of power to confer upon its citizens the right to jury trial under the Seventh Amendment of the United States Constitution.

Thus, this Court has jurisdiction to review a violation of such right.

II. CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

The United States Constitution Amendment VII provides:

> "In suits at common law, where the value and controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no

> fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

This right was specifically preserved to petitioner "inviolate" by L.S.A. C.C.P. art. 1731, which provides:

> "A. Except as limited by Article 1732, the right of trial by jury is recognized.
>
> B. The nature and amount of the principal demand shall determine whether any issue in the principal or incidental demand is triable by jury.

Acts 1983, No. 534 §1.

Official Revision Comments

> This article serves the same purpose as Fed. Rule 38(a), which provides that the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate . . . ".

Amendment X of the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

III. STATEMENT OF THE CASE

Petitioner and defendant, The State of Louisiana, requested a jury trial in this matter. Thus, the right to trial

by jury was invoked by both parties at the trial court level.[1]

Thereafter, petitioner argued the applicable law with respect to jury verdicts at page 4 of his appellate brief under "Standard Of Review".

This argument was re-urged in his Application For Writs of Certiorari to the Louisiana Supreme Court throughout the application, but particularly on pages 1 through 4. Thus, the issue has been preserved for review by this Court.

Pursuant to Rule 10(b) and (c), this writ should be granted because: the erroneous opinion of the appellate court which has in essence been sanctioned by the Louisiana Supreme Court by virtue of its refusal, despite two requests, to invoke its supervisory jurisdiction, directly conflicts with the decisions of this Court and the United States Fifth Circuit Court of Appeals, protecting a party's constitutional right to trial by jury.

This Court should therefore invoke its supervisory jurisdiction to insure that petitioner, other citizens of the State of Louisiana and, indeed other citizens of the various states may, by this Court's rulings, be assured of their federally guaranteed rights to jury trials. A further benefit of this Court invoking its supervisory jurisdiction is to provide direction and guidance to the courts of the several states as to the constitutional limitations placed upon them in modifying determinations of fact by juries.

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[1] This was the first case in the history of the State of Louisiana where the State requested a jury trial.

The court of appeal found that the jury committed manifest error in allocating fault between two tortfeasors. It completely ignored all evidence favorable to plaintiffs supporting the jury verdict. It did not conduct the two part analysis of the record to determine if the trial court was clearly wrong as required by applicable Louisiana law. It increased the driver fault from 45% to 100% and decreased the fault of the State from 45% to 0% in this case involving a dangerous raveled roadway edge, 3⅝" shoulder drop-off, one foot (1') shoulder and excessive, nonrecoverable embankment slope without a guardrail. The ditch was more than seven feet (7') deep. The record supports the reasonable factual findings on the part of the jury in determining and allocating fault. In holding that the Louisiana Department of Transportation ("DOTD") was not at fault because no design standards existed when the highway was originally constructed, the court of appeal ignored the decision of the Louisiana Supreme Court in *Dill v. State Department Of Transportation and Development*, 545 So.2d 994 (La. 1989) which held that DOTD cannot escape liability by simply showing that the highway met the standards existing when it was built.

The errors committed by the court of appeal resulted in a reallocation of fault from the State to an insolvent driver which effectively deprived petitioner of over $2,025,000 in damages. The costs of his future health care alone is in excess of $1,900,000, yet he is left with virtually no collectable recoverable damages.

This Court should correct these errors and, at least, reinstate the jury verdict.

A. Narrative of Facts

On April 30, 1993, at about 9:15 p.m. a severe one car accident occurred on LA State Highway 552. The car was driven by Ronald Powell. Mr. Powell had steered slightly to the right while meeting an oncoming vehicle. The car's right wheels hit a jagged edge of roadway, dropping nearly four inches (4") onto a mere one foot (1') shoulder and nonrecoverable embankment. The roadway was dry but the shoulder and embankment were slippery and wet.

Mr. Powell immediately tried to bring the car back upon the roadway but was unable to do so. Because of the steepness of the incline, the vehicle flipped three times, ejecting and injuring some of its occupants, shattering Addison Worthington's vertebrae and rendering him a paraplegic. Mr. Worthington was awarded $4,500,000 in damages. Mr. Powell had a minimum liability policy of 10/20/10. The State was assessed 45% fault and cast with a $2,025,000 judgment, as to Mr. Worthington's claim. (Appendix Exhibit 1). The court of appeal, without mentioning one shred of evidence that supported the jury's verdict, simply substituted its own version of the facts in holding the driver 100% at fault and effectively took away the entire $2,025,000. (Appendix Exhibit 2). Mr. Worthington's future medical expenses alone, exceed $1,900,000. The Louisiana Supreme Court denied writs.

B. Summary of Judicial Action

The case was tried for five (5) days to a 12 person jury which heard testimony from 22 witnesses, 10 of

whom were State witnesses. It reviewed 79 exhibits, including 28 photographs and a video of the scene. The jury deliberated three (3) hours and returned its verdict.

The jury verdict was supported by substantial evidence, much of which was virtually uncontradicted. The roadway edge was extremely ragged. The roadway to shoulder drop-off was $3^{5}/_{8}$ inches. The 370 feet the vehicle traveled after leaving the roadway was all on a nonrecoverable shoulder and embankment slope, the steepness of which caused the vehicle to flip until it came to final rest at the bottom of the ditch which was over seven feet (7') deep. Mr. Powell immediately and appropriately reacted once the wheels of his small car hit the ragged pavement edge and dropped onto the shoulder. The investigating trooper found "yaw" marks indicating that Mr. Powell attempted to re-enter the highway. The evidence was uncontradicted that the inadequacy of the shoulder width, the excessive shoulder slope and excessive embankment slope caused the vehicle to flip. The evidence was also uncontradicted that the embankment slope, which was a mere one foot (1') from the raveled roadway edge, was nonrecoverable. Several witnesses who observed Mr. Powell immediately before the accident did not think that he was impaired. Dr. Bruce Wheeler, a medical doctor and plaintiffs' expert, testified that Mr. Powell's blood alcohol content at the time of the accident was between .05% and .075%.

The jury was presented with evidence from which it could have reasonably concluded that work done on this highway in 1949 constituted reconstruction requiring 1946 DOTD Road Design Standards be followed. These required a four foot (4') shoulder with a maximum

embankment slope of three to one. This roadway had only a one foot (1') shoulder originally and at the time of the accident. It had been paved over, leaving a ragged edge due to improper maintenance. The adjacent embankment slope was nonrecoverable and connected to a ditch over seven feet (7') in depth. There was no guardrail. The State argued its only duty was to maintain a one foot (1') shoulder. Despite almost 44 years in which to do so, the State never widened the shoulder, built up the embankment or placed a guardrail in this dangerous area. It also failed to properly maintain the one foot (1') shoulder.

All parties requested judgments notwithstanding the verdict, the State to escape liability, the plaintiffs to expand the State's fault. These motions were all denied by the trial court because the trial judge felt there was adequate evidence to support the jury verdict. All parties appealed.

The court of appeal completely disregarded the trial judge's rulings and the jury's finding of fault and impermissibly substituted its own judgment for that of the jury, despite the substantial evidence which supported the jury's verdict. The court of appeal found Mr. Powell solely at fault in causing the accident and gave no weight to the substantial evidence to the contrary. In doing so, it has selectively extracted and erroneously interpreted certain evidence supportive of the State – but completely ignored the overwhelming body of evidence favorable to plaintiffs. Simply stated, it improperly substituted its judgment for that of the trial judge and jury.

IV. ASSIGNMENTS OF ERROR

A. The court of appeal did not determine from the record whether a reasonable factual basis existed for the finding of the jury that DOTD was negligent and/or strictly liable; and, erroneously determined that the jury was clearly wrong. The Court gave no deference to the jury's evaluation of weight of evidence and credibility of witnesses and wrongly substituted its judgment for that of the trial judge and jury.

B. The court of appeal erred in failing to follow *Clement v. Frey*, 666 So.2d 607 (La. 1996), by giving no deference to the jury verdict in reallocating fault.

V. ARGUMENT

A. FIRST ASSIGNMENT OF ERROR

The court of appeal did not determine from the record whether a reasonable factual basis existed for the finding of the jury that DOTD was negligent and/or strictly liable; and, erroneously determined that the jury was clearly wrong. The Court gave no deference to the jury's evaluation of weight of evidence and credibility of witnesses and wrongly substituted its judgment for that of the trial judge and jury.

The apportionment of fault by the trier of fact is a factual finding which can only be overturned if it was clearly wrong or manifestly erroneous. *Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1978). Where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly wrong. *Rosell v. Esco*,

549 So.2d 840 (La. 1989). Where the fact finder's conclusions are based on determinations regarding credibility of the witnesses, the manifest error standard demands great deference to the trier of fact, because only the trier of fact can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. *Id.* If a trier of facts findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse even if convinced that if it had been sitting as trier of fact, it would have weighed the evidence differently. *Stobart v. State, through Department of Transportation and Development*, 617 So.2d 880 (La. 1993).

For the reviewing court, the issue to be resolved is not whether the trier of fact was wrong but whether the fact finder's conclusions were reasonable. *Stobart*, supra. Where the testimony of expert witnesses differ, it is the responsibility of the trier of fact to determine which evidence is most credible. *Stobart*, supra; and, *Sistler v. Liberty Mutual Insurance Company*, 558 So.2d 1106 (La. 1990).

The test for reversal of a fact finder's determination is two part: (1) the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court; and (2) the appellate court must further determine that the record establishes that the fact finder is clearly wrong (manifestly erroneous). *Stobart*, supra.

The appellate court did not perform the first pronged test of *Stobart*. It did not determine whether a reasonable factual basis existed for the finding of the trial court,

choosing instead to consider only the testimony of the State's witnesses in reaching its erroneous determination that the jury and the trial judge were clearly wrong. The court of appeal never attempted to find reasonable support for this jury's verdict.

The court of appeal found that the accident was solely the fault of Mr. Powell due to his "impairment" and "excessive speed". In reaching this conclusion, the appellate court ignored virtually every fact and expert witness except the Trooper and Dr. Blascke, the State's expert. Much of their testimony was favorable to plaintiffs, yet the court ignored the favorable portions.

(1) REVIEW OF THE RECORD

(i) IMPAIRMENT

Every witness who observed Mr. Powell prior to the accident either: did not think that he was impaired; or, did think that he was capable of operating the vehicle safely; or, thought he did operate the vehicle safely. (R 509; 510; 512; 579; 580; 626; 484; 490).

Dr. Wheeler testified that based upon what Mr. Powell had eaten that evening, the amount of beer he consumed and the time frame within which it was consumed, at the time of the accident Mr. Powell's blood alcohol level would have been between .05% and .075%. Dr. Wheeler's reasoning was scientifically supported.

Dr. Roane, a pharmacologist and the State's expert, was merely informed of Mr. Powell's blood alcohol level at the time the blood was drawn at the hospital, without being provided any of the other factors considered by Dr.

Wheeler in reaching his opinion. Thus, Dr. Roane did not have the facts or knowledge to extrapolate the blood alcohol content of the driver at the time of the accident. Nevertheless, the court of appeal totally disregarded this conflicting evidence and summarily determined that Mr. Powell caused the accident because of his impaired condition.

The jury was justified in choosing to believe Dr. Wheeler on the issue of blood alcohol levels, and numerous other witnesses as to Mr. Powell's unimpaired condition, in finding that driver impairment was not the sole cause of this accident.[2]

(ii) REACTION TIME

The appellate court found that Mr. Powell should have been able to react to the emergency situation in as little as $^{3}/_{10}$th of a second – yet, inexplicably ignored

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[2] In *Brown v. Department of Transportation and Development*, 572 So.2d 1058 (La.App. 5th Cir. 1990), *writ denied*, 581 So.2d 710 (1991), the driver of the vehicle had a blood alcohol content (BAC) of .125%. Yet the court of appeal held the driver only 40% at fault in causing the wreck. Likewise, in *Holmes v. DOTD*, 466 So.2d 811 (La. App. 3rd Cir. 1985), *writ denied*, 472 So.2d 31 (1985), the driver had a BAC of .073% and had smoked marijuana prior to the accident. The court of appeals allocated fault of 60% to DOTD and 40% to the driver. Finally, in *Campbell v. Department of Transportation and Development*, 648 So.2d 898 (La. 1995) the issue was not driver impairment but driver inattentiveness. In *Campbell*, the driver actually fell asleep and drifted off the road, crashing into a bridge abutment. This Court overturned the court of appeal's allocation of fault and reinstated the trial court's allocation of 25% fault to the driver and 75% to DOTD.

evidence that he did so. Mr. Powell testified that when the lights of the oncoming vehicle blinded him, he eased over to the right side of the road and the car wheels dropped off of the highway onto the shoulder. He tried to get it back upon the road but couldn't. Instead, the wheel hit a "pothole" at the edge of the highway and the car careened onto the nonrecoverable embankment and flipped. Mr. Powell specifically stated that he immediately tried to get the vehicle back upon the roadway when it first went off. (R 361). His testimony is supported by the physical evidence. State Police Trooper Barbara Powdrill in deposition on February 24, 1994, a portion of which was read during her trial testimony, testified:

> "Q. *Was there any indication that the driver of the vehicle had . . . attempted to steer his car back onto the road?*
>
> A. *Yes, there was.*
>
> Q. *Can you tell me what that evidence was?*
>
> A. *The tracks weren't going straight off. They were like that. They were – indicated that he had possibly tried to come back up on but didn't.*
>
> Q. So they were curving back to the left as though he had tried to steer the vehicle back to the –
>
> A. No, lets not say curving. They were yawing back to the left."

(R 427, 428) [emphasis added].

Within approximately 50 feet from the point where the vehicle initially left the road, the vehicle was completely off the roadway. The vehicle width was six feet

(6'). A vehicle traveling 60 miles per hour will travel 88 feet per second. Thus, in less than 1/10 of a second, the vehicle's right wheels had passed the shoulder and entered the non-recoverable embankment.[3] Too soon for a normal 3/10 second reaction. (R 467). In 3/10th of a second, the vehicle would travel 26.4 feet. The yaw marks evidence the recovery attempt. The fact that the tracks were yawing evidences immediate reaction.

It is evident that the jury had before it evidence that driver impairment did not cause this accident. Mr. Powell exercised excellent hand eye coordination shortly before driving; his blood alcohol level at the time of the accident was between .05% and .075%; and, as soon as the vehicle's right wheels left the highway, he immediately reacted appropriately by trying to steer back onto the roadway. Road condition caused the accident.

(iii) SPEED

Next, the appellate court found that Mr. Powell was unable to return to the highway due to excessive speed, *despite uncontradicted evidence that no vehicle could have recovered from this slope at the posted speed limit*. The posted speed was 55 miles per hour. Mr. Duaine Evans, plaintiffs' expert in the field of traffic engineering and accident

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[3] The calculation is: 50 feet traveled in one direction angling from 0 feet at 0 feet to 6 feet at 50 feet = 8.333 feet forward movement to 1 foot of side movement. Thus, at 8.333 feet of forward movement, the car's right wheels were crossing the right edge of the one foot shoulder onto the nonrecoverable embankment. 8.333 feet divided by 88 fps = .0947 seconds, or less than 1/10th of a second.

reconstruction, was the only witness who properly calculated the speed of the vehicle at the time of the accident. Mr. Evans calculated the speed of the vehicle to be between 55 and 65 miles per hour. (R 448). Because the shoulder, embankment slope and ditch were wet and slick, he further opined that a more accurate estimate of speed would be at the lower end of his 55-65 mile per hour estimate. (R 450). In fact, Dr. Blaschke's (the State's expert) low end estimate of speed was also 55 miles per hour. (R 830). Thus, the jury could reasonably have concluded that the vehicle was traveling 55 miles per hour when it left the roadway

(iv) ROAD CONDITION

The appellate court found that the plaintiffs had not shown that raveling, an absence of correct maintenance procedures, or the lack of a guardrail at the accident site caused the accident. The court further chose to consider only the evidence of roadway crumbling presented through the State Maintenance Superintendent, Mr. Tolar's testimony which only referenced a 3/4 inch thickness of crumbling. Further, the court held that because plaintiffs had failed to show that the raveling constituted a hazardous condition, evidence relating to the propriety of DOTD's maintenance procedures was irrelevant. Again, to reach this conclusion, the appellate court disregarded substantial evidence to the contrary.

Mr. Evans found drop-offs 3 5/8" in depth in the area where the vehicle left the roadway. Even Dr. Blaschke acknowledged that a 3 5/8" drop could be a problem for a small car. (R 834; 835). The accident vehicle was a very

small car – a new Pontiac Sunburst compact with a 4-cylinder engine. (R 363).

(v) MAINTENANCE

The appellate court also held that plaintiffs failed to show that an absence of correct maintenance procedures caused the accident.[4] The DOTD maintenance procedures were examined in minute detail during the testimony of Dr. Joseph Blaschke, Mr. Donald Tolar and Mr. John Watley. The DOTD Maintenance Guidelines prescribe methods for permanently repairing the road conditions found in this case. The area to be patched must be cleaned and all loose material removed. Next, the edge of the pavement should be brushed with a tack material, which is a glue, sticky substance. This permits the new asphalt to bond with the old asphalt. Next, the premix is placed with shovels and leveled with rakes in two inch layers and hand-tamped or rolled. Then the final layer of pre-mix is applied even with the edge of the pavement, sloping away to provide proper drainage and to permit future blading. The outside edge of the patch should be

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[4] Where a shoulder drop off has occurred, the failure to correct the drop off through maintenance has been held to be fault through which the DOTD can be held liable. See *Moon v. City of Baton Rouge*, 522 So.2d 117 (La. App. 1st Cir. 1987), *writ denied*, 523 So.2d 1319 (1988), quoting *Myers v. State Farm Mutual Automobile Insurance Company*, 493 So.2d 1170 (La. 1986) at page 123: "Although it is true that the City-Parish is not required to reconstruct all of its roadways to meet modern standards, it is still required to maintain an existing roadway in a reasonably safe condition."

trimmed parallel to the road to provide a uniform highway edge line. Finally, the patched area should be rolled after the pre-mix material has cooled enough so that it will not stick to the roller. (R 854 through 858). These procedures were not followed by the DOTD maintenance personnel.

Instead of following the DOTD Maintenance mandates, Mr. Watley, the Parish Superintendent for DOTD in Union Parish, testified that his crews simply shovel the pre-mix out of the back of a dump truck onto the raveled area, rake it in with an asphalt rake and roll over it with the dump truck wheel. In fact, Mr. Watley candidly admitted that the patch job at the accident scene was not a "very good job". (R 652). The State did not use a roller because Mr. Watley was afraid it would turn over on the narrow and uneven shoulder and injure his workers. (R 644-645).

Mr. Watley testified that drop-offs in excess of 3" should be scheduled for maintenance. (R 664). He also acknowledged that the raveled portion of the asphalt adjacent to the shoulder was unsafe to travel on.[5] (R 671-672).

Thus, contrary to the appellate court finding, there is ample evidence in the record to show that absence of

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[5] DOTD clearly had notice of this raveling condition because it had placed over 57 tons of pre-mix on this section of roadway in the four months preceding the accident repairing potholes and road edges. (R 631-632).

correct maintenance procedures caused the raveling condition, which in turn caused Mr. Powell to lose control of his vehicle at the time of the accident.

(vi) GUARDRAIL – EXCESSIVE SLOPE

The appellate court held that plaintiffs had failed to prove that lack of a guardrail at the accident site caused the accident. This finding either ignores or seriously misunderstands the substance of Mr. Evans' testimony which not only explained how a guardrail could have prevented the seriousness of this accident but also established that the roadway condition was unreasonably dangerous because of the raveled condition of the roadway edge, the inadequate and almost nonexistent shoulder, the excessive shoulder slope and the unrecoverable embankment slope.

Mr. Evans' opinion was that the accident was caused, at least in part, by the dangerous road condition. The raveled roadway edge was dangerous, and the slope of the shoulder was excessive. There were drop-offs $3^{5}/_{8}$" in depth. The shoulder width of approximately one foot was substandard, too narrow and was hardly useable as a shoulder. The shoulder slope was, in places, three times the maximum acceptable slope. The embankment slope was excessive in slope to the point of being nonrecoverable once a vehicle entered it. The adjacent ditch was well over seven feet (7') deep. Finally, there should have been a protective guardrail preventing vehicles from entering the embankment slope and flipping into the ditch. In his opinion, all of these factors contributed to this accident. (R 445 through 460; 834).

Mr. Evans also testified that any vehicle entering the embankment slope where the accident vehicle did, would not be able to recover if the vehicle was traveling 45 miles per hour or more. The reason for this was the steep incline of the embankment into a ditch over seven feet (7') deep. This type of embankment is commonly known as "an unrecoverable embankment". At a minimum, guardrails should have been placed along the shoulder to prevent vehicles from entering this nonrecoverable area. Guardrails are relatively inexpensive and could have been installed at any time after the highway was built. (R 459).

Even Trooper Powdrill agreed that the shoulder at the accident scene was very narrow – the roadway edge was jagged – and the shoulder and embankment were extremely steep, slippery and muddy. She stated that the flipping of the vehicle was caused by the steep embankment and the direction of the vehicle. (R 427 through 428).

A simple guardrail would have prevented this petitioner's injuries.

(vii) DESIGN STANDARDS

The appellate court accepted the testimony of Dr. Blaschke for the proposition that the *State of Louisiana Department of Highways Road Design Standards And Miscellaneous Data* published September, 1946 did not apply to the work performed on this highway in 1949. (Appendix, Exhibit 2). In doing so, the court ignored Mr. Evans' testimony and opinion that the design standards did apply to the 1949 work.

Even Dr. Blaschke admitted that the design standards were probably followed for new construction and reconstruction projects. Mr. Israel, a DOTD executive, confirmed this to be so.

It was Mr. Evans' opinion that the 1949 work constituted a reconstruction to which the 1946 standards would have applied. Those standards required a minimum of a four foot shoulder with a maximum embankment slope of three to one. (R 475-477). Instead, the State deliberately built one foot shoulders and excessive embankment slopes as reflected by the "As-built plans".

While design standards may not be determinative of liability of the State in cases such as this, they certainly are relevant in determining whether a given situation on a state roadway presented an unreasonable risk of harm to a passing motorist. *Dill,* supra.

This roadway, as reconstructed in 1949, contained two nine foot travel lanes which were hard surfaced and aggregate shoulders on each side of the road, one foot in width. Over the years, due to resurfacing, the one foot shoulders were partially hard surfaced to create two ten foot travel lanes. This virtually eliminated the shoulder. (R 861). Dr. Blaschke acknowledged that this situation could create the raveling problem at the accident scene unless the area next to the pavement surface is maintained well. (R 862). This accident area was poorly maintained.

The DOTD has a duty to maintain reasonably safe highways and shoulders and this duty extends to the protection of those people who may drive onto the shoulder inadvertently, as well as passengers in vehicles that

stray from the road. *Sinitere v. Laverne*, 391 So.2d 821 (La. 1980).

Furthermore, LSA-R.S. 48:35 mandates that DOTD adopt minimum safety standards with respect to highway design, construction and maintenance. DOTD adopted these standards. The failure to follow them in this case left this accident scene in an unreasonably dangerous condition.

B. SECOND ASSIGNMENT OF ERROR

The court of appeal erred in failing to follow *Clement v. Frey*, 666 So.2d 607 (La. 1996) by giving no deference to the jury verdict in real-locating fault.

An appellate court's fixing of a fault percentage in its unfettered discretion, with no deference whatever to the district court's finding, is improper. *Clement v. Frey*, supra. *Clement* held that an appellate court may only reallocate fault after finding a "clearly wrong" apportionment of fault, following which it may adjust the award, but only to the extent of lowering or raising it to the highest or lowest point respectively which is reasonably within the trial court's discretion.

The jury could not have committed manifest error in finding DOTD partially at fault on this record. However, assuming, *arguendo*, that the jury's fault allocation was wrong, the court of appeal could not have reasonably or properly concluded that DOTD had zero (0) fault.

C. FEDERAL RIGHTS

This Court has long held that one of the fundamental underpinnings of our system of justice is the citizen's right to trial by jury. Even in the federal system, where judges are appointed for life time terms, this Court has jealously guarded the citizen's right to trial by jury.

However, that right is even more fundamentally important in the state court systems where the judges are elected and are thus subjected to political pressures and climates from time to time existing within the several states. Louisiana, in particular, has undergone a severe swing in political climate within the last few years. During these times of political change, often a litigant can only be assured of a truly impartial determination of his legal rights by submitting them to a jury of his peers which is a right guaranteed by the Seventh Amendment.

In *Basham v. Pennsylvania Railroad Company*, 372 U.S. 699, 10 L.Ed. 2d 80, 83 S.Ct. 965 (1963), this Court, in reversing a New York court of appeals decision held:

> "The conflict in the testimony was resolved by the jury's verdict in favor of the petitioner. Since there was an evidentiary basis for that verdict, it was error for the New York trial and appellate courts to re-evaluate the conflicting evidence and mandate a result opposite from that reached by the jury. In *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916, . . . the employer argued, as does respondent here, that its evidence tended to show it was physically impossible for its equipment to have injured the employee. There, as in this case, the suing employee offered evidence that the injury was the result of equipment failure. In reversing a state court judgment

> setting aside a jury verdict for the employee, this court said, in language fully apposite here: "Only when there is a complete absence of probative facts to support the conclusion reached (by the jury) does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The United States Fifth Circuit Court of Appeal strictly follows this cardinal rule of appellate review of fact determinations by juries. *Perry v. Morgan Guaranty Trust*, 521 F.2d 1378 (5th Cir. 1976).

Petitioner believes that this State appellate court routinely reevaluates conflicting testimony and substitutes its judgment for that of the jury, as it did in this case, in complete disregard of litigant's constitutional rights.

Here, as in *Basham*, petitioner's evidence constituted probative facts sufficient to support the jury's allocation of fault and the appellate court improperly invaded the function and province of the jury in setting the verdict aside.

For these same reasons, it was error for the Louisiana Supreme Court to deny writs of certiorari in this case. This is especially so in view of petitioner's application for reconsideration and motion to recuse in that court – both of which were denied without adequate explanation. (Appendix Exhibit 5).

VI. CONCLUSION

Addison Worthington was horribly injured. A shattered vertebrae left him a paraplegic. He has no control of his bowels or kidneys. He is in serious need of vital medical attention and is totally dependent upon the help and charity of other people. The appellate court has wrongfully taken his award, depriving him of the ability to obtain meaningful medical care.

The accident was at least partly caused by the negligence of the State and by the defective condition of the highway for which the State is strictly liable.

This case was tried to a 12 person jury which heard all of the evidence, good and bad. The jury carefully weighed that evidence and assessed fault in accordance with its findings and determinations as to what weight and credibility should be given that evidence. On every factual and legal issue the jury was presented with evidence which supported the plaintiffs' theory of liability. At an absolute minimum, there were two permissible views of the evidence. Thus, the jury verdict cannot be manifestly erroneous.

The court of appeal grossly overstepped its bounds and in seven short pages completely erased all of the jury's findings and substituted its own judgment as to the weight and credibility of each and every witness.

In so doing, it chose to accept only the evidence most favorable to the State and to either ignore or disbelieve all evidence favorable to the petitioner. The court of appeal was clearly wrong in so doing and has imposed an unconscionable and unbelievable hardship, especially

upon Addison Worthington, in its indifference not only to the evidence supporting the petitioner's case – but also to the law which clearly and expressly prohibits the appellate court action in this case.

This unthinkable result casually plucked from Mr. Worthington his only means to be assured of proper medical care during the remainder of his crippled life – a means awarded to him by an important tribunal, a jury – a jury requested by the State – a jury verdict now wrongfully reversed by the State appellate court.

This Honorable Court is respectfully requested to correct this injustice, grant this writ application and reinstate the jury verdict.

Respectfully submitted,

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APPENDIX

Judgment rendered October 30, 1996. Application for rehearing may be filed within the delay allowed by Art. 2166, La. C.C.P.

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

Nos. 28,638-CA; 28,639-Ca; 28,640-CA
28,641-CA; 28,642-CA

* * *

No. 28,638-CA
ADDISON JACK WORTHINGTON

v.

VASA NORTH ATLANTIC INS. CO., ET AL

No. 28,640-CA
CHARLES RAY WHITAKER

v.

VASA NORTH ATLANTIC INS. CO., ET AL

No. 28,642-CA
DANNY POWELL

v.

VASA NORTH ATLANTIC INS. CO., ET AL

No. 28,639-CA
TONY DEAN MULLINS

v.

VASA NORTH ATLANTIC INS. CO., ET AL

No. 28,641-CA
RONALD L. POWELL

v.

STATE OF LOUISIANA, DOTD

* * *

Appealed from the
Third Judicial District Court for the
Parish of Union, Louisiana
Trial Court Nos. 32,097; 32,200; 32,397; 32,556; 32,560

Honorable Robert Jackson, Judge Ad Hoc

* * *

RICHARD IEYOUB Attorney General	Counsel for State of Louisiana, DOTD, Defendant-Appellant
JAMES R. DAWSON Assistant Attorney General	
JAMES E. MIXON	Counsel for Ronald Powell, Plaintiff-Appellee-Appellant
DOLLAR, LAIRD & SCOTT, L.L.P. By: JOHNNY E. DOLLAR and R. ANDERSON MICOLAS	Counsel for Worthington, Mullins, and Danny Powell, Plaintiffs-Appellees-Appellants
CHESTER A. BRADLEY, III	Counsel for Charles Whitaker, Plaintiff-Appellee-Appellant

* * *

Before HIGHTOWER, WILLIAMS, STEWART, JJ.

STEWART, J., concurs.

NOT DESIGNATED FOR PUBLICATION
Rule 2-16.3, Uniform Rules, Courts of Appeal.

HIGHTOWER, Judge

In this lawsuit arising from a one-car accident on Louisiana Highway 552 in Union Parish, the defendant

Louisiana Department of Transportation and Development ("DOTD") appeals an adverse jury verdict finding that state agency equally at fault with the plaintiff-driver in causing the mishap and further assessing the four plaintiff-passengers with ten percent responsibility for the injuries they each sustained. Answering, all plaintiffs seek to enlarge the fault apportionment against DOTD to 100 percent, and three claimants request an increase in damages. We reverse in part and amend.

FACTS AND BACKGROUND

At approximately 9:15 p.m. on April 30, 1993, after playing pool and consuming alcohol at a Union Parish establishment, Danny Powell, Jerry Powell, Tony Dean Mullins, Charles Ray Whitaker, and Addison Worthington headed home as guest passengers in a Pontiac Sunbird driven by Ronald Powell. Before their departure, inasmuch as they had all been drinking and because the proprietor verbally questioned whether or not Ronald Powell should be driving a five to ten minute discussion ensued in the parking lot about who would actually operate the vehicle. Eventually, Ronald Powell assumed the wheel. After proceeding west on Louisiana Highway 552 about one-quarter mile, the men stopped at a dirt road to relieve themselves. Upon resuming travel for roughly another mile, Powell encountered two easterly-bound vehicles in a curve. After he edged off the road and straddled the shoulder, his automobile flipped off the embankment, ejecting four of his companions and causing bodily injuries to all occupants.

Ronald Powell, Danny Powell, Mullins, Whitaker, and Worthington filed suit against the State of Louisiana, through the Department of Transportation and Development. These four passengers also sued Ronald Powell and his insurer, VASA North Atlantic Insurance Company, and the state similarly asserted third party demands against him. After the court consolidated the separately instituted actions. VASA received a voluntary dismissal. At trial, the other four plaintiffs dismissed their claims against Ronald Powell.

After considering the evidence concerning the driver's demands, the jury apportioned fault equally (fifty percent each) to him and the state. As for the claims of the guest passengers, the panel found both Ronald Powell and the state forty-five percent at fault and assessed each plaintiff with ten percent fault. The jurors fixed damages in the amount of $4,500,000 for Worthington, $30,000 for Ronald Powell, $25,000 for Whitaker, and $10,000 each for Danny Powell and Mullins. Claiming error in the determination of liability and alternatively the fault allocations, the state filed a motion for judgment notwithstanding the verdict and/or new trial. All plaintiffs likewise sought judgment notwithstanding the verdict, requesting an expansion of the state's fault as well as increases in the awards to Danny Powell and Whitaker. After the denial of all motions, these appeals ensued.

DISCUSSION

A.

On appeal, the state maintains the evidence fails to demonstrate that Highway 552 posed an unreasonable

risk of harm. Instead, it asserts, the accident resulted solely from the intoxication of the driver and the excessive speed of the vehicle. Conversely, plaintiffs contend that inadequate shoulders, raveling of pavement edges, excessive shoulder and embankment slope, lack of guardrails, and improper maintenance created an unreasonably dangerous condition.

Highway 552 is a rural, twelve and one-half mile, tree-lined highway servicing local traffic in Union Parish. Typical of roads built in the 1930's, the two travel lanes have a combined width of twenty-feet with one-foot turf shoulders. After its initial construction in 1936, the byway underwent subsequent overlays in 1948-49 and 1958. Nearing the accident location from the east, the road inclines slightly and curves approximately one-quarter of a mile before intersecting with La. Highway 15. Advisory speed for the curve is 50 m.p.h., while the posted general speed limit is 55 m.p.h. The pavement was dry on the evening in question, but the embankment remained somewhat muddy from hard rainfall during previous days.

The officer investigating the accident, Trooper Barbara Powdrill, calculated the speed of the vehicle at 75-80 m.p.h., with the car traveling 370 feet after its departure from the highway. noting the distinctive odor of alcohol at the scene and Ronald Powell's actions in the emergency room, she described the driver as "very intoxicated." Powell admitted that he consumed a couple of beers in the forty-five minutes just prior to leaving the establishment, and at least five beers during the evening. Two hours after the accident, his blood alcohol level

measured 0.15 percent. The officer, based upon her observations and evaluations, postulated the cause of the mishap to be Ronald Powell's intoxication coupled with excessive speed. One corroborative witnesses, who had been standing in his nearby driveway only moments before the crash, testified that Powell's automobile maintained "a high rate of speed."

Plaintiffs' expert in accident reconstruction, Dwain Evans, listed five factors producing the accident, two of which included excessive speed and alcohol consumption. He calculated the vehicle to have been traveling between 55-65 m.p.h. and fixed critical speed for the curve at 65 m.p.h., the speed at which a car would tend to slide off the road. While aware of plaintiffs' alcohol consumption and its general effect on reaction time, Evans had no expertise in that area and therefore offered no opinion on intoxication as an accident cause. Instead, downplaying vehicle speed and driver impairment, he attributed the accident to DOTD's failure to build or maintain adequate shoulder width (a minimum of five feet) and proper shoulder and embankment slopes (a four-to-one slope from the edge of the shoulder down to the ditch line) in accordance with 1946 and 1954-55 design standards. As the linchpin of his testimony. Evans assumed that certain work performed on the highway in 1949 and 1958 could be classified as "reconstruction." He admitted that, in the absence of reconstruction, the design standards in effect at the time of original construction would apply. He further conceded his ignorance as to when the road had first been built.

At trial, upon viewing the 1948-49 project plans (State's exhibit 19) for the first time. Evans recognized the

inaccuracy of his research and the error of his supposition that the initial hard-surfacing of the road occurred in 1958. He nevertheless opined that even the 1948-49 work constituted reconstruction, to which 1946 design standards should have applied. During further cross examination, however, he acknowledged that DOTD faced no mandate for the placement of guardrails, even in 1958-59. Also, although indicating that the substandard shoulder caused raveling, Evans failed to comment upon the existence or seriousness of that condition at the accident site. As for maintenance procedures, plaintiffs presented DOTD work reports (Worthington 9) concerning general repair on Highway 552, from December 1, 1992 through June 23, 1993, and questioned the agency's maintenance superintendent for Union Parish about the upkeep methods implemented. None of these reports, however, pertained directly to the accident location.

The state's witnesses, in addressing applicable design standards, established initial construction of the highway in 1936 and, further, classified the 1949 and 1958 work as overlay projects that repaired the riding surface. Dr. Joseph Blaschke, an expert in highway design and accident reconstruction, explained that roadway "reconstruction," unlike overlay, involves the rebuilding of the thoroughfare from the ground up. Design standards apply only to the initial construction or reconstruction, while an overlay simply involves the maintenance of the original standards despite the existence of more up-to-date regulations.

Given the high number of elder roadways in Louisiana, Dr. Blaschke indicated not only would it be unrealistic to update all of these according to more recent design

standards, but also there exists no state or federal requirement to do so. Donald Tolar, DOTD District Maintenance engineer, confirmed that neither design nor overlay standards existed at the time of original construction, and that the previously-created shoulders and slopes had been maintained in both the 1948-49 and 1958 overlay projects.[1] Furthermore, according to these witnesses and a road design engineer, Highway 552 does not create an unreasonable risk to the traveling public.

Dr. Blaschke identified the cause of the accident, instead, to be driver impairment. In his opinion, the vehicle had been traveling at 60-80 m.p.h. David Roane, a pharmacology-physiology expert in the effects of alcohol on mental and physical factions, showed that impairment of bodily performance begins at 0.04 to 0.05 grams of alcohol per one hundred milliliters of blood. Gross impairment of motor skills and judgment occurs at a 0.15 percent concentration. Given that blood alcohol levels normally decline two hours from consumption, Dr. Blaschke posited that Powell experienced greater impairment at the time of the accident than reflected by even his subsequent high test results. Indeed, Roane calculated Powell's blood alcohol at 0.19 percent at the time of the accident. Further, considering the 370-foot distance and assuming a 60 m.p.h. speed, Blaschke calculated a four-second interval from the time the vehicle left the roadway until it rested. Based upon Roane's testimony establishing normal re-entry reaction time at 3/10 of a second, both experts opined that an unimpaired driver would easily

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[1] State's Exhibit 19 reflects notations to the latter effect.

have been able to return to the highway under the existing circumstances. Similarly, Bruce Wheeler, plaintiff's expert, admitted that impairment occurs at the 0.05 percent blood alcohol level, although he opined that the results peaked two hours after the accident.

Regarding raveling, Tolar testified that condition will appropriately be scheduled for routine repair upon reaching a depth of three inches and will undergo immediate repair at five or more inches. Maintenance guidelines, submitted into evidence by plaintiffs, substantiate that statement. Upon inspecting the accident site in October 1993. Tolar discovered no significant raveling.[2] Although observing a crumbling of the 3/4-inch-thick surface treatment, he explained that such a condition did not warrant even the scheduling of repair according to maintenance guidelines. Dr. Blaschke's opinion, in concert with Tolar's testimony, indicated that the common occurrence of 1-1 1/2 inch raveling neither necessitated repair, nor created an unreasonably hazardous condition.

B.

Highway 552 is characteristic of roadways constructed in the 1930's with narrow shoulders and fairly steep slopes. Hundreds of thousands of miles possessing such features exist throughout Louisiana, Texas, Oklahoma, and Arkansas. Dr. Blaschke testified that it would be unrealistic to bring all of Louisiana's roads up to present-day

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[2] Reviewing the DOTD work reports (Worthington 9), he also found no disclosure of maintenance performed at this location following the accident.

regulations; such an undertaking would be both physically and financially impossible. For this reason, the failure of DOTD to reconstruct the state's highways to meet modern standards does not establish the existence of a hazardous defect. *Holloway v. State, Through DOTD,* 555 So. 2d 1341 (La. 1990); *Monasco v Poplus,* 530 So. 2d 548 (La. 1988); *Myers v. State Farm Mutual Auto. Ins. Co.,* 493 So. 2d 1170 (La. 1986). No design or overlay standards existed during the construction of Highway 552. In performing the subsequent overlay work, DOTD appropriately preserved the existing shoulders and slopes. Under these circumstances, that agency did not breach its duty to maintain this section of Highway 552 in a reasonably safe condition.

Nor have plaintiffs shown that raveling, an absence of correct maintenance procedures, or the lack of a guardrail at the accident site caused the accident. As previously indicated, Tolar discovered a crumbling measurement of only 3/4 inch thickness, a depth insufficient even for the scheduling of repair. Furthermore, with plaintiffs having failed to show that the raveling constituted a hazardous condition, any evidence relating to the propriety of DOTD's maintenance procedures is irrelevant as to this aspect. Similarly, plaintiff's own expert agreed that no requirement for a guardrail existed, even in the late 1950's, and the evidence fails to show that the lack of such a device here created a unreasonable risk.

Accordingly, we find Ronald Powell solely at fault in causing this accident. During at least four seconds, he traveled a distance of 370 feet after leaving the pavement. The evidence shows that a sober person would have been able to respond in as little as 3/10 of a second. Instead,

Powell found himself unable to return to the highway due to his intoxication and excessive speed, not because of inadequate shoulder width, excessive shoulder slope, or raveling. Thus, DOTD is not liable to plaintiffs for the injuries sustained. The jury was clearly wrong in finding otherwise. The judgment against DOTD must be reversed.

Inasmuch as the passengers have dismissed their demands against the driver, we pretermit any discussion of their comparative fault and such connected issues.

DECREE

For the reasons assigned, the jury verdict is reversed insofar as it apportioned fault to the State of Louisiana, through the Department of Transportation and Development. Judgment is rendered in favor of the State of Louisiana through the Department of Transportation and Development, dismissing it from the suit at plaintiffs' cost. The district court judgment is amended to find Ronald Powell solely at fault.

REVERSED IN PART; AMENDED IN PART.

THE SUPREME COURT OF THE STATE OF LOUISIANA

ADDISON JACK WORTHINGTON

vs.
VASA NORTH ATLANTIC INS, CO., ET AL

TONY DEAN MULLINS
VS.
VASA NORTH ATLANTIC INS, CO., ET AL

CHARLES RAY WHITAKER
VS.
VASA NORTH ATLANTIC INS. CO., ET AL

RONALD L. POWELL

VS. NO. 96-C - 2869

STATE OF LOUISIANA, DOTD

AND OTHER CONSOLIDATED CASES

IN RE: Worthington, Addison Jack; Mullins, Tony Dean; Powell, Danny; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Union 3rd District Court Div. "B" Number 32,097; to the Court of Appeal, Second Circuit, Number 28638-CA, 28639-CA, 28640-CA, 28641-CA, 28642-CA

January 31, 1997

Denied.

CDT

PFC

WFM

HTL

CDK

BJJ

JTK

VICTORY, J. not on panel.

Supreme Court of Louisiana
January 31, 1997

/s/ Illegible
Clerk of Court
For the Court

THE SUPREME COURT OF THE STATE OF LOUISIANA

ADDISON JACK WORTHINGTON
vs.
VASA NORTH ATLANTIC INS, CO., ET AL

TONY DEAN MULLINS
VS.
VASA NORTH ATLANTIC INS, CO., ET AL

CHARLES RAY WHITAKER
VS.
VASA NORTH ATLANTIC INS. CO., ET AL

RONALD L. POWELL
VS. NO. 96-C- 2869
STATE OF LOUISIANA, DOTD
AND OTHER CONSOLIDATED CASES

IN RE: Worthington, Addison Jack; Mullins, Tony Dean; Powell, Danny; (Plaintiff(s); Applying for Reconsideration of this Court's Order dated January 31, 1997; to the Court of Appeal Second Circuit Numbers 28638-CA; 28639-CA; 28640-CA; 28641-CA; 28642-CA; Parish opf Union 3rd District Court Division "B" Number 32,097.

March 21, 1997

Reconsideration denied. Judgment is definitive. Motion to recuse not timley [sic] filed.

JTK

PFC

WFM

HTL

CDK

BJJ

VICTORY, J., – not on panel.

Supreme Court of Louisiana
March 21, 1997

/s/ Illegible
Clerk of Court
For the Court

No. 96-C-2869

SUPREME COURT

STATE OF LOUISIANA

ADDISON JACK WORTHINGTON
TONY DEAN MULLINS
AND
DANNY POWELL
PLAINTIFFS-APPELLEES-SECOND
APPELLANTS-APPLICANTS

VERSUS

STATE OF LOUISIANA THROUGH THE
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT
DEFENDANT-APPELLANT-RESPONDENT

(NOS. 28638-CA, 28639-CA, 28640-CA, 28641-CA
AND 28642-CA)
On the docket of the Court of Appeal
for the Second Circuit,
State of Louisiana

APPLICATION FOR REHEARING AND MOTION
TO RECUSE ON BEHALF OF PLAINTIFFS-APPLICANTS
ADDISON JACK WORTHINGTON; TONY DEAN
MULLINS; AND, DANNY POWELL

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No. 96-C-2869
SUPREME COURT
STATE OF LOUISIANA

ADDISON JACK WORTHINGTON
TONY DEAN MULLINS
AND
DANNY POWELL
PLAINTIFFS-APPELLEES-SECOND
APPELLANTS-APPLICANTS

VERSUS

STATE OF LOUISIANA THROUGH THE
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT
DEFENDANT-APPELLANT-RESPONDENT

(NOS. 28638-CA, 28639-CA, 28640-CA, 28641-CA
AND 28642-CA)
On the docket of the Court of Appeal
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State of Louisiana

APPLICATION FOR REHEARING AND
MOTION TO RECUSE
ON BEHALF OF PLAINTIFFS-APPLICANTS
ADDISON JACK WORTHINGTON; TONY DEAN
MULLINS; AND, DANNY POWELL

NOW INTO COURT, through undersigned counsel, comes ADDISON JACK WORTHINGTON, TONY DEAN MULLINS AND DANNY POWELL, who respectfully move this Honorable Court as follows:

I.

For the reasons more fully expressed in the accompanying memorandum, movers urge this Court to grant a rehearing on the denial of the writ application in this matter and recuse Justice Traylor from the panel in considering the writ application.

WHEREFORE, ADDISON JACK WORTHINGTON, TONY DEAN MULLINS AND DANNY POWELL, pray that this Honorable Court grant a rehearing on the denial of their writ application and further, for all general and equitable relief.

Respectfully submitted,

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No. 96-C-2869
SUPREME COURT
STATE OF LOUISIANA

ADDISON JACK WORTHINGTON
TONY DEAN MULLINS
AND
DANNY POWELL
PLAINTIFFS-APPELLEES-SECOND
APPELLANTS-APPLICANTS

VERSUS

STATE OF LOUISIANA THROUGH THE
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT
DEFENDANT-APPELLANT-RESPONDENT

(NOS. 28638-CA, 28639-CA, 28640-CA, 28641-CA
AND 28642-CA)
On the docket of the Court of Appeal
for the Second Circuit,
State of Louisiana

MEMORANDUM IN SUPPORT OF
APPLICATION FOR REHEARING AND
MOTION TO RECUSE
ON BEHALF OF PLAINTIFFS-APPLICANTS
ADDISON JACK WORTHINGTON;
TONY DEAN MULLINS; AND, DANNY POWELL

MAY IT PLEASE THE COURT:

This matter came before the Court on an application for writs of review of the reversal by the Second Circuit Court of Appeal of a 4.5 million dollar jury verdict partially in favor of the applicants. This Court denied the application for writs on the 31st day of January, 1997.

Subsequent to the Second Circuit Court of Appeal's reversal of the jury verdict and the filing of the initial writ by plaintiffs, the Honorable Charles D. Traylor was sworn in as a justice of this Honorable Court. Justice Traylor took the seat of the Honorable Joe Bleich. Mr. Johnny Dollar, undersigned counsel and plaintiffs' attorney, was very active in the Justice Bleich campaign and was the informal campaign manager of both of Justice Bleich's campaigns for the Supreme Court. Unfortunately, both races were hotly contested, involving allegations of untruths and negative campaigning directed towards the Justice Bleich campaign from then Judge Traylor.

Upon information and belief, it is also alleged that the instant case, or one very similar to this case, was commented upon negatively by Judge Traylor in his campaign for the Supreme Court. Justice Traylor's initials appear at the top of the list of seven justices presumably assigned to review this writ under Rule IV of the Supreme Court Rules. Plaintiff is also informed that this positioning of Justice Traylor's initials strongly suggests he was the primary justice to whom this case was assigned for reporting to the remaining members of the panel. In light of Judge Traylor's comments about this or a very similar case while pending, as well as the apparent animosity that existed during the two campaigns, it appears that Justice Traylor may be or have become biased, prejudiced or interested in the outcome of this matter towards undersigned counsel. In light of the history and comments of Justice Traylor during his recent campaigns to allow him to sit on the panel in this writ application creates a reflection and appearance of impropriety in the handling of this matter and will lead to the

denial under the color of State law of the right to a trial by jury, equal protection and due process these plaintiff's deserve. The State requested that this case be decided by a jury. The State's judicial appellate system has taken this jury's verdict away contrary to the law. Thus, it is respectfully requested that this Court grant a rehearing on the writ application of the applicants with Justice Traylor removed from the writ panel and the panel considering this request pursuant to La. Code Civ. Pro. art. 151.

Respectfully submitted,

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(21220)
Attorneys for Plaintiffs-
Applicants

STATE OF LOUISIANA
PARISH OF QUACHITA

VERIFICATION

BEFORE ME, the undersigned authority, personally came and appeared:

R. NICOLAS ANDERSON

who being duly sworn did say that he is counsel for plaintiffs/applicants, Addison Jack Worthington, Danny Powell and Tony Dean Mullins, and that all of the allegations of the application for rehearing are true and correct to the best of his knowledge, and that a copy of the application has been mailed to the appropriate court of appeal and to opposing counsel in accordance with the rules of this Court.

The names, addresses and telephone number of all counsel are as follows:

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Attorney for DOTD

/s/ R. Nicholas Anderson

SWORN TO AND SUBSCRIBED BEFORE ME, this 12th day of February, 1997.

/s/ Deborah A. Creech
NOTARY PUBLIC

STATE OF LOUISIANA • PARISH OF UNION •
THIRD DISTRICT COURT

ADDISON JACK WORTHINGTON

VERSUS NO. 32,097

VASA NORTH ATLANTIC INSURANCE COMPANY, RONALD L. POWELL AND THE STATE OF LOUISIANA

FILED: June 14, 1995

BY: /s/ Kathy Gilbert
DEPUTY CLERK

JUDGMENT

This matter having been tried to a twelve person jury which returned its verdict, after due deliberations, on June 5, 1995, assessing damages and fault as follows:

1. As to the claim of Addison Jack Worthington: $4,500,000.00 in damages; fault to be apportioned 45% to the State of Louisiana; 45% to Ronald L. Powell; and 10% to Addison Jack Worthington;

2. As to the claim of Danny Powell: $10,000.00 in damages; fault to be apportioned 45% to the State of Louisiana; 45% to Ronald L. Powell; and 10% to Danny Powell;

3. As to the claim of Tony Dean Mullins: $10,000.00 in damages; fault to be apportioned 45% to the State of Louisiana; 45% to Ronald L. Powell; and 10% to Tony Dean Mullins;

4. As to the claim of Charles Ray Whitaker: $25,000.00 in damages; fault to be apportioned 45% to the State of Louisiana; 45% to Ronald L. Powell; and 10% to Charles Ray Whitaker; and

5. As to the claim of Ronald L. Powell: $30,000.00 in damages; fault to be apportioned 50% to the State of Louisiana and 50% to Ronald L. Powell.

THE FOREGOING HAVING BEEN DULY CONSIDERED, the plaintiffs dismissal of all claims against Ronald L. Powell having been duly considered:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of Addison Jack Worthington and against the State of Louisiana in the amount of $2,025,000.00 together with legal interest from date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Danny Powell and against the State of Louisiana in the amount of $4,500.00 together with legal interest from date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of Tony Dean Mullins and against the State of Louisiana in the amount of $4,500.00 together with legal interest from date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of Charles Ray Whitaker and against the State of Louisiana in the amount of $11,250.00 together with legal interest from date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of Ronald L. Powell and against the State of Louisiana in the amount of $15,000.00 together with legal interest from date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each party to these proceedings bear the costs in the proportions of fault indicated.

THUS DONE AND SIGNED this 13th day of June, 1995, in Alexandria, Louisiana.

/s/ Robert Jackson
HONORABLE ROBERT JACKSON
JUDGE AD HOC

Supreme Court, U.S.
FILED
AUG 27 1997
CLERK

No. 97-206

In The

Supreme Court of the United States

October Term, 1996

ADDISON JACK WORTHINGTON,

Petitioner,

versus

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT AND RONALD L. POWELL,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court For The State Of Louisiana

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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HIPP

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

A. STATEMENT OF FACTS 1

B. PROCEDURAL HISTORY OF THIS CASE 2

SUMMARY OF ARGUMENTS FOR DENYING WRIT 4

ARGUMENT 5

1. This application for writ of certiorari was not timely filed 5

2. This writ application seeks to raise for the first time in this court issues not presented below or not properly raised below 7

a. Denial of Right to Civil Jury Trial 7

b. Misconduct by Louisiana Supreme Court Justice Chet D. Traylor 7

3. The issues presented by petitioner in his writ application do not warrant review by this Court as they do not involve any of the compelling reasons required 9

a. Seventh Amendment Claims by Petitioner... 9

b. Appellate Review of Facts and Law 11

4. The Second Circuit Court of Appeal was correct in finding that the jury was "clearly wrong" in finding the State of Louisiana responsible for the accident 15

CONCLUSION 24

TABLE OF CITED AUTHORITIES

Page

CASES

UNITED STATES SUPREME COURT

Braxton v. U.S., 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (U.S. Md. 1991) 9

Federal Election Commission v. NRA Political Victory Fund, 513 U.S. 88, 115 S.Ct. 537, 130 L.Ed.2d 439 (U.S. D.C. 1994) 7

Gasperini v. Center for Humanities, Inc., 116 S.Ct. 2211, 135 L.Ed.2d 659, 64 USLW 4607 (U.S. N.Y., 1996) 14

Hallie v. City of Eau Claire, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (U.S. Wis. 1985) 7

Heller v. Doe, 509 U.S. 312, 113 S.Ct. 2637, 125 L.Ed.2d 257 (U.S. Ken. 1993) 7

Lumbermen's Mutual Casualty Company v. Elbert, 348 U.S. 48, 75 S.Ct. 151, 99 L.Ed. 59 (U.S. La. 1954) 11

Missouri v. Jenkins, 495 U.S. 33, 110 S.Ct. 1651, 109 L.Ed.2d 31 (U.S. Mo. 1990) 7

Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d. 420 (U.S. Neb. 1981) 14

UNITED STATES COURTS OF APPEAL

Cheramie v. Tucker, 493 F.2d 586 (5th Cir.(La.), 1974), *certiorari denied*, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d. 107 (U.S. La. 1974) 14

TABLE OF CITED AUTHORITIES – Continued

Page

UNITED STATES DISTRICT COURTS

Collins v. Collins, 597 F. Supp 33 (N.D. Ga., 1984) 15

Melancon v. McKeithen, 345 F. Supp. 1025 (E.D. La. 1972), *affirmed*, 409 U.S. 943, 93 S.Ct. 289, 34 L.Ed.2d 214 (U.S. La. 1972) 10, 12

LOUISIANA SUPREME COURT

Blaize v. Hayes, 15 So.2d 228 (La. 1943)..... 6

Dennis v. Henderson, 228 So.2d 484 (La. 1969)..... 6

Ferrell v. Fireman's Fund Ins. Co., 94-1252 (La 2/20/95), 650 So.2d 742 12

Gonzales v. Xerox Corp., 320 So.2d 163 (La.1975) 12

Posey v. Fabre, 373 So.2d 535 (La. 1979) 6

Rathe v. Jefferson Parish School Board, 19 So.2d 153 (La. 1944) 8

Rodrigue v. LeGros, 563 So.2d 248 (La. 1990) 8

Rudolph v. Massachusetts Bay Insurance Co., 472 So.2d 901 (La.1985)..... 10

State v. Beamish, 19 So.2d 258 (La. 1944)..... 6

State v. Phillips, 350 So.2d 903 (La. 1977) 6

State v. Sanders, 337 So.2d 1131(La. 1976)..... 6

TABLE OF CITED AUTHORITIES – Continued

Page

LOUISIANA COURTS OF APPEAL

Adams v. City of Baton Rouge, 95-2515 (La. App. 1st Cir. 4/30/96), 673 So.2d 624, *writ denied*, 96-1491 (La. 9/20/96), 679 So.2d 439 11

Blanchard v. City Parish of East Baton Rouge, 95-2011 (La. App. 1st Cir. 4/30/96), 674 So.2d 317, *writ denied*, 96-1511 (La. 9/20/96), 679 So. 2d 443 10

Carter v. City of New Orleans, 327 So.2d 488 (La. App. 4th Cir.1976) 10

Haworth v. L'Hoste, 95-0714 (La. App. 4th Cir. 11/30/95), 664 So. 2d 1335, *writ denied*, 96-0408 (La. 3/29/96), 670 So.2d 1235 12

Heindel v. Harley-Davidson Motorcycles, 467 So.2d 641 (La. App. 4th Cir.), *reversed*, 477 So.2d 695 (La.1985) 10

Holt v. Aetna Casualty & Surety Co., 28,450 (La. App. 2nd Cir. 9/3/96), 680 So.2d 117, *writ denied*, 96-2515 (La. 12/6/96), 684 So.2d 937 12

Mayeaux v. Christakis, 619 So.2d 93 (La. App. 5th Cir. 1993) 8

Olivier v. Allstate Insurance Co., 95-306 (La. App. 3rd Cir. 10/4/95), 663 So.2d 207 12

Simon v. Fasig-Tipton Company of New York, 574 So.2d 554 (La. App. 3rd Cir. 1991), *writ denied*, 580 So.2d 381 (La. 1991), *certiorari denied*, 502 U.S. 983, 112 S.Ct. 588, 116 L.Ed.2d 613 (U.S. La. 1991) 6

Young v. Logue, 94-0585 (La. App. 4 Cir. 5/16/95), 660 So.2d 32, *writ denied*, 95-2575 (La. 12/15/95), 664 So.2d 443 12

TABLE OF CITED AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

United States Constitution, Amendment VII 9

LOUISIANA CONSTITUTION

Louisiana Constitution, 1974, Art. V, § 10(B) 11, 12

FEDERAL AND STATE STATUTES

L.S.A. C.C.P. Art. 159 8

L.S.A. C.C.P. Art. 2164 12

L.S.A. C.C.P. Art. 2166 D 6

UNITED STATES SUPREME COURT RULES

Rule 10, Supreme Court Rules 9

Rule 13, Supreme Court Rules 5

LOUISIANA SUPREME COURT RULES

Rule IX, Section 6, Louisiana Supreme Court Rules 6

BRIEF IN OPPOSITION

The State of Louisiana, Department of Transportation and Development, respectfully represents:

STATEMENT OF THE CASE

Petitioner herein seeks discretionary review by this Court of the Louisiana State Supreme Court denial of writs below. Petitioner sought the discretionary review by the Louisiana Supreme Court to review the decision of the Louisiana Second Circuit Court of Appeal wherein that court reversed a jury verdict which had found the State of Louisiana, Department of Transportation and Development, to be comparatively at fault in causing injury to the petitioner.

The State of Louisiana, Department of Transportation and Development, shows that for the reasons set forth herein this Court should not grant petitioner's writ application.

A. STATEMENT OF FACTS

On Friday afternoon, April 30, 1993, petitioner Addison Jack Worthington and five other individuals had been drinking for a number of hours at a pool hall/convenience store located on Highway 552, near Downsville, Louisiana, leaving as it was closing for the evening.

As they were leaving the establishment, the driver, Ronnie Powell, was asked by the owner if he was driving. He assured her he was not, that Worthington was.

In the parking lot there was an extended "discussion" as to who should drive, others either offering to drive or being volunteered, with the decisions being made based on their respective assessments as to how much each had to drink. They accounted for the accompanying shouting during this decision making process as being necessary because one of the group was hard of hearing.

One of the participants objected to Worthington driving, alleging that he had been drinking prior to the trip to the pool hall/convenience store. Another offered to drive but another refused to ride in the car if he drove. Powell, apparently tiring of the discussion, made a command decision that he was going to drive.

Approximately a half-mile down the road, the vehicle stopped to allow the passengers to disembark and relieve themselves. They reentered the vehicle and continued.

After another half-mile, Powell entered a curve. He testified that as he entered the curve, another vehicle's lights blinded him and he edged off the side of the road. For approximately 300 feet, the vehicle straddled the shoulder, with the right tires off the roadway and the left tires on the paved portion. As the vehicle approached a steeper portion of the roadside area near a culvert, it flipped, ejecting four of the six occupants.

B. PROCEDURAL HISTORY OF THE CASE

Worthington and four of the five occupants, including the driver, filed suit against the State of Louisiana, Department of Transportation and Development, alleging

that the accident was caused by the failure of the State to properly design and maintain the highway.

Trial by jury was requested by the plaintiffs and by the State.

At the conclusion of the trial, the jury determined that the State was equally at fault with the driver in causing the accident and further found that each of the occupants was ten percent (10%) at fault for their own injuries.

The State requested a Judgment Notwithstanding the Verdict, or alternatively, a new trial. The trial judge denied these requests and the State appealed to the Louisiana Second Circuit Court of Appeal.

On October 30, 1996, the Louisiana Second Circuit Court of Appeal, issued its opinion that the jury was "clearly wrong" in finding that the State was liable and reversed, amending the trial court judgment to find that the driver was solely at fault.

Petitioner sought writs of certiorari with the Louisiana Supreme Court, which were denied on January 31, 1997. He then sought a rehearing of the writ denial and further requested the recusal of Justice Chet D. Traylor, alleging that Justice Traylor had acted improperly and had inappropriately influenced his fellow justices.

This rehearing/recusal was denied by the Louisiana Supreme Court on March 21, 1997.

On April 24, 1997, the petitioner filed in this Court a Motion for Extension of Time Within Which to Apply for

Writs of Certiorari. This was denied by Justice Scalia on April 29, 1997.

This application for writ was filed, noted by this Court as postmarked June 19, 1997, and received on June 23, 1997. The application was returned to the petitioner for failure to comply with the rules of this Court.

The writ application was subsequently placed on the docket August 5, 1997.

SUMMARY OF ARGUMENTS FOR DENYING WRIT

This writ application was untimely filed and does not present any compelling reasons required for its consideration. The jury was "clearly wrong" in its determination that the accident giving rise to the petitioner's injuries was the result of anything other than the intoxication and negligence of the driver. The appellate court had the constitutional duty to correct that error. Petitioner was denied a discretionary review in the Louisiana Supreme Court. He then improperly sought a rehearing of the writ denial and sought for the first time to recuse Louisiana Supreme Court Justice Chet D. Traylor, alleging that Justice Traylor bore his attorney personal animosity and acted in such a way to improperly influence his fellow justices. The Louisiana Supreme Court correctly rejected both requests. Petitioner now asks this Court to consider the constitutionality of appellate review of both facts and law in the Louisiana courts of appeal and the propriety of Justice Traylor's presence on the panel denying writs, issues that were not presented in the courts below.

ARGUMENT

1. This application for writ of certiorari was not timely filed.

Rule 13, Supreme Court Rules, provides in part:

> "1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.
>
> 2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, e.g., 28 U.S.C. s 2101(c).
>
> 3. . . . if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties . . . runs from the date of the denial of the petition for rehearing . . . "[1]

Petitioner filed this writ application on June 19, 1997, 139 days after the January 31, 1997 entry of the order denying writs in the Louisiana Supreme Court.

This proposed filing outside of the 90 days is based on petitioner's suggestion to this Court that it is timely

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[1] See Appendix for complete rule.

filed as it was filed on the 90th day after the denial for rehearing of the writ denial on March 21, 1997.

However, the petitioner had no right to request a rehearing in the Louisiana Supreme Court of his writ denial. Accordingly, the application for rehearing was of no effect and cannot be used to extend the time for filing.

Rule IX, Section 6, Louisiana Supreme Court Rules, provides that: "An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari . . . "[2] See *Posey v. Fabre*, 373 So.2d 535 (La. 1979); *State v. Phillips*, 350 So.2d 903 (La. 1977); *State v. Sanders*, 337 So.2d 1131(La. 1976); *Dennis v. Henderson*, 228 So.2d 484 (La. 1969); *State v. Beamish*, 19 So.2d 258 (La. 1944); *Blaize v. Hayes*, 15 So.2d 228 (La. 1943).

Louisiana Code of Civil Procedure (La. C.C.P.) article 2166 D[3] states that a judgment of a court of appeal becomes final when the state supreme court denies the application for certiorari. See, i.e., *Simon v. Fasig-Tipton Company of New York*, 574 So.2d 554 (La. App. 3rd Cir. 1991), *writ denied*, 580 So.2d 381 (La. 1991), *certiorari denied*, 502 U.S. 983, 112 S.Ct. 588, 116 L.Ed.2d 613 (U.S. La. 1991).

A petition for certiorari in a civil case from a state court must be filed within 90 days of the entry of the

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[2] See Appendix for complete text of rule.

[3] See Appendix for complete text of statute.

judgment complained of below. *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 115 S.Ct. 537, 130 L.Ed.2d 439 (U.S. D.C. 1994).

"This 90-day limit is mandatory and jurisdictional." *Federal Election Commission v. NRA Political Victory Fund, supra*, at 90, at 539; *Missouri v. Jenkins*, 495 U.S. 33, 45, 110 S.Ct. 1651, 1660, 109 L.Ed.2d 31 (U.S. Mo. 1990).

2. This writ application seeks to raise for the first time in this court issues not presented below or not properly raised below.

a. Denial of Right to Civil Jury Trial

In this writ application, petitioner argues that the Louisiana Second Circuit Court of Appeal finding that the jury was clearly wrong in imposing any liability on the State of Louisiana, Department of Transportation and Development, was in some way a denial of a constitutional right to civil trial by jury. This issue was not raised in his application for writs to the Louisiana Supreme Court and, as such, should not be considered by this Court. *Heller v. Doe*, 509 U.S. 312, 113 S.Ct. 2637, 125 L.Ed.2d 257 (U.S. Ken. 1993) and *Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (U.S. Wis. 1985).

b. Misconduct by Louisiana Supreme Court Justice Chet D. Traylor

In a manner consistent with petitioner's constant attempt to avoid responsibility for his own actions, he has raised before this Court allegations of gross misconduct

on the part of Louisiana Supreme Court Justice Chet D. Traylor.

Petitioner sought to raise this issue for the first time in his improper request for rehearing of the Louisiana Supreme Court's denial of his writ application. In denying the application, the court characterized the rehearing request as a motion to recuse and stated that it was not timely filed.

Petitioner filed no written motion seeking the recusal of Justice Traylor. Motions to recuse a justice of the supreme court must be in writing. L.S.A. C.C.P. Art. 159.[4] See, i.e., *Mayeaux v. Christakis*, 619 So.2d 93 (La. App. 5th Cir. 1993)

Further, such a motion to recuse cannot be raised after the fact. *Rathe v. Jefferson Parish School Board*, 19 So.2d 153 (La. 1944). Petitioner was aware of all the facts upon which he based his scurrilous allegations of impropriety prior to the court's consideration of his original writ application.

(Even if the request for rehearing was authorized, the supreme court would not have considered it as rehearings are generally not granted to consider issues raised for first time in an application for rehearing. See, i.e., *Rodrigue v. LeGros*, 563 So.2d 248 (La. 1990))

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[4] See Appendix for complete text of statute.

3. The issues presented by petitioner in his writ application do not warrant review by this Court as they do not involve any of the compelling reasons required.

Rule 10, Supreme Court Rules, provides that:

> "Review on a writ of certiorari is not a matter of right, but of judicial discretion and that a petition for a writ of certiorari will be granted only for compelling reasons."

It further provides that:

> "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[5]

The principal purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. See, i.e., *Braxton v. U.S.*, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (U.S. Md. 1991). No such purpose presents itself to this Court in this application.

a. Seventh Amendment Claims by Petitioner

Initially, it should be noted that the Seventh Amendment right to a civil jury trial has not been extended to the state judicial system.

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[5] See Appendix for complete text of rule.

As stated in *Blanchard v. City Parish of East Baton Rouge*, 95-2011 (La. App. 1st Cir. 4/30/96), 674 So.2d 317, *writ denied*, 96-1511 (La. 9/20/96), 679 So. 2d 443:

> "The Bill of Rights, which includes the seventh amendment right to jury trial, is directly applicable only to the federal government. The rights become applicable to the states when the United States Supreme Court, through a process of "selective" incorporation, determines that each is required by the fourteenth amendment's guarantee of due process. *Rudolph v. Massachusetts Bay Insurance Co.*, 472 So.2d 901, 903 (La.1985). Thus, whether the right to a civil jury trial must be afforded by a state to its citizens, at least insofar as mandated by the United States Constitution, is dependent on whether the United States Supreme Court considers the civil jury trial an essential aspect of due process.
>
> "The United States Supreme Court, whose authority with respect to, and interpretation of, the United States Constitution is preeminent, has already decided that the right to jury trials in civil cases is not so fundamental to the American system of justice as to be required of state courts by the due process clause of the fourteenth amendment. *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La.1972), *affirmed*, 409 U.S. 943, 93 S.Ct. 289, 34 L.Ed.2d 214 (1972); *Rudolph v. Massachusetts Bay Insurance Co.*, 472 So.2d at 902. As a result, the seventh amendment is one of the few rights contained in the Bill of Rights which has not been made applicable to the states. *Rudolph v. Massachusetts Bay Insurance Co.*, 472 So.2d at 903. See also *Carter v. City of New Orleans*, 327 So.2d 488, 490 (La. App. 4th Cir.1976); *Heindel v. Harley Davidson Motorcycles*,

467 So.2d 641, 645 (La. App. 4th Cir.), *reversed, order striking jury reinstated*, 477 So.2d 695 (La.1985)." at 319.

See, also, *Adams v. City of Baton Rouge*, 95-2515 (La. App. 1st Cir. 4/30/96), 673 So.2d 624, *writ denied*, 96-1491 (La. 9/20/96), 679 So.2d 439.

b. Appellate Review of Facts and Law

The Louisiana Constitution provides that the appellate jurisdiction of a court of appeal extends to law and facts. La. Const. 1974, Art. V, § 10(B).[6]

This Court has long recognized this approach by Louisiana courts. See, i.e., *Lumbermen's Mutual Casualty Company v. Elbert*, 348 U.S. 48, 75 S.Ct. 151, 99 L.Ed. 59 (U.S. La. 1954): "In Louisiana, appellate review in civil cases extends to both matters of law and fact." at 53, 155.

This provision, resulting from Louisiana's history as a civilian jurisdiction, has been interpreted as giving an appellate court the power to decide factual issues de novo. The exercise of this power is limited, however, by the jurisprudential rule of practice that a trial court's factual findings will not be upset unless they are manifestly erroneous or clearly wrong. Nevertheless, when the court of appeal finds that a reversible error of law or manifest error of material fact was made in the trial court, it is required, whenever possible, to redetermine the facts de novo from the entire record and render a judgment on

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[6] See Appendix for complete text.

the merits. *Ferrell v. Fireman's Fund Ins. Co.*, 94-1252, pp. 3-4 (La. 2/20/95), 650 So.2d 742, 745; *Young v. Logue*, 94-0585 (La. App. 4th Cir. 5/16/95), 660 So.2d 32, 41, *writ denied*, 95-2575 (La. 12/15/95), 664 So.2d 443.

As such, the appellate courts of the state need not defer entirely to the fact finder's determinations; rather, they are empowered and are under a constitutional mandate to review the record in its entirety. See La. Const. art. V, § 10(B); *Ferrell*, 94-1252, at p. 5, 650 So.2d at 746; *Young*, 94-0585, at p. 9, 660 So. 2d at 32.

Following such review, should the appellate court conclude that the fact finder's determinations are clearly wrong or manifestly erroneous, they must reverse the erroneous determinations, conduct an independent review of the record, and render a just and proper decision on the evidence adduced at trial. See L.S.A. C.C.P. Art. 2164[7]; *Gonzales v. Xerox Corp.*, 320 So.2d 163, 165 (La.1975); *Young*, 94-0585, at p. 9, 660 So. 2d at 32; *Holt v. Aetna Casualty & Surety Co.*, 28,450 (La. App. 2nd Cir. 9/3/96), 680 So.2d 117, *writ denied*, 96-2515 (La. 12/6/96), 684 So.2d 937; *Haworth v. L'Hoste*, 95-0714 (La. App. 4th Cir. 11/30/95), 664 So. 2d 1335, *writ denied*, 96-0408 (La. 3/29/96), 670 So.2d 1235; and *Olivier v. Allstate Insurance Co.*, 95-306 (La. App. 3rd Cir. 10/4/95), 663 So.2d 207.

In *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. LA., 1972), *affirmed by Mayes v. Ellis*, 409 U.S. 943, 93 S.Ct. 289, 34 L.Ed.2d 214 (U.S. La., 1972), and *affirmed by Hill v. McKeithen*, 409 U.S. 943, 93 S.Ct. 290, 34 L.Ed.2d 214 (U.S. La., 1972), and *affirmed by Davis v. Edwards*, 409 U.S. 1098,

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[7] See Appendix for complete text of statute.

93 S.Ct. 908, 34 L.Ed.2d 679 (U.S. La., 1973), Judge J. Minor Wisdom noted that assuming the right to a civil jury trial is required by due process:

> " . . . the Louisiana scheme does not destroy that right, but modifies it in accordance with fair procedures many of which are analogous to procedures established in the Federal Rules of Civil Procedure." at 1045.

Judge Wisdom went on to note:

> "[I]t suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. . . . In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard. (*Citation omitted*)
>
> "B. The soundness of this federal principle would seem to be peculiarly applicable to procedure in Louisiana. The law of this state is unique. Nevertheless, its lawmakers, legislative and judicial, have managed to work out compromise procedures compatible with Louisiana's civilian heritage and with the Anglo-American concept of due process. There is appellate review on the facts as well as on the law, but it is subject to the requirement that factual findings of a trial court or the verdict of a jury should be

> disturbed only when they are manifestly erroneous. (*Citations omitted*)
>
> * * *
>
> "If the kind of appellate review of the facts that exists in Louisiana is unconstitutional, then the Supreme Court should take a second look at the constitutionality of the Federal Rules." at 1047

Such state appellate court review of factual determinations have consistently been noted by this Court to be satisfactory. See, i.e., *Gasperini v. Center for Humanities, Inc.*, 116 S.Ct. 2211, 135 L.Ed.2d 659, 64 USLW 4607 (U.S. N.Y., 1996); and *Parratt v. Taylor*, 451 U.S. 527, 542, 101 S.Ct. 1908, 1916, 68 L.Ed.2d. 420 (U.S. Neb. 1981).

Similarly, had this petitioner sought to collaterally attack the appellate reversal for the same reasons presented in his application before this Court, his action would have been summarily dismissed.

In *Cheramie v. Tucker*, 493 F.2d 586 (5th Cir.(La.), 1974, *certiorari denied*, 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d. 107 (U.S. La. 1974), the Fifth Circuit noted:

> "The substance of the appellant's claim is not the unconstitutionality of the Louisiana system but the alleged unconstitutional application of the system to his case. In essence he contends that the state court merely paid 'lip service' to the doctrine of manifest error which is alleged to save the constitutionality of the Louisiana system. (*Footnote omitted*) To reach this issue it is necessary to re-examine the validity of the state court judgment . . .

* * *

"The appellant has had a full and fair opportunity to litigate the issue of the Highway Department's negligence. For this court to grant the appellant his requested relief it would be necessary to reexamine the negligence issue. This we decline to do. It does not appear to be appropriate under any theory advanced by the appellant for this court to review the decision of the appellate courts of Louisiana in a negligence case." at 589.

In accord, see *Collins v. Collins*, 597 F. Supp. 33 (N.D. Ga. 1984):

"By whatever name it is called, however, the principle remains the same. Federal courts are not in the business of hearing attacks on state court judgments where the state has provided an opportunity for appellate review to satisfy the requirements of due process." at 39.

4. The Second Circuit Court of Appeal was correct in finding that the jury was "clearly wrong" in finding the State of Louisiana responsible for the accident

As the Second Circuit Court of Appeal stated, the finding that the State was in anyway responsible for this accident was "clearly wrong" for the following reasons:

There was no defect in the roadway to cause this vehicle to leave the road;

There was no deviation from any applicable design or construction standards;

There was no evidence that this accident was caused or contributed to by any failure to properly maintain the roadway or its shoulders; and

The sole cause of this accident was the intoxication and negligence of the driver.

Contrary to the assertions to the petitioner in his writ application, there was no testimony that any drop-off existed in this area that created an unreasonable risk of harm or that played any role in this accident.

Indeed, the petitioner's expert Duaine Evans testified that in his opinion this accident was caused by the failure of the State to meet guideline requirements for shoulder, shoulder slope and guardrails, the driver's intoxication, and the driver's speed. (R 445). There was absolutely not one word said by him as to any drop-off, let alone any dangerous condition. The only testimony as to the existence of any drop-off was made by the State's expert when he was questioned about Mr. Evan's pre-trial deposition testimony. In that deposition, Mr. Evan's said that he had found a $3^5/_8$" drop-off between the paved portion and the adjoining gravel area at only one point but that it had not played any role in the accident.

For petitioner's counsel to now claim that this accident was occasioned by the driver inadvertently encountering a dangerous drop-off causing him to lose control of the vehicle is a total misstatement of the facts and testimony and either indicates a failure to correctly state the facts and testimony or an unwillingness to do so.

At trial, there was no testimony that the driver of the vehicle left the roadway for any reason other than his own negligence.

This highway was testified to by DOTD Road Design Engineer Administrator Kent Israel as having come into the state system prior to 1936. (R 821). It was first hard surfaced in 1948-49 and again subjected to a surface treatment in 1959. Both of these actions were considered by DOTD personnel as having been overlay projects, not new construction or major reconstruction. (R 822).

The State of Louisiana did not adopt design or construction standards for its highways until 1955. (R 821) Even if they had been in effect in 1948, they would not have been applicable to the hard surfacing done in that year as it was not considered by DOTD to be either new construction or major reconstruction. These standards were not applicable to overlay projects. The state did not adopt overlay standards until 1974. (R 821).

Further, the plans for the 1948-1950 hard surfacing and the 1959 surface treatment called for the maintenance of existing shoulders and slope, not construction of new or additional shoulders or an alteration in the slope of the adjacent embankments. The testimony of the District Maintenance Engineer (Don Tolar) was that the duty of the DOTD was to maintain the existing shoulders and slope and that it had done so. There was no contrary testimony.

Evans opined that the shoulder width constituted a defect because it was not built in accordance with the design standards[8] in effect at the time the road was hard

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[8] The standards referred to by Mr. Evans and the other witnesses were standards as to new highway construction or major reconstruction adopted by the state legislature in 1955

surfaced, which Mr. Evans had determined through his own inquiry to have been in 1958 and 1959. (R 453-454).

Likewise, in his opinion, the shoulder slope at six (6') and eight (8') feet from the roadway was excessive because it had not been built in accord with those same standards. (R 462).

Regarding the lack of a guardrail at the site of the culvert, Mr. Evans acknowledged that the referred to standards did not address the need for a guardrail, but that those standards would have required a wider shoulder, alleviating any danger posed by the lack of a guardrail. (R 469).

Mr. Evans testified that in his opinion the State had failed in its responsibility to meet design criteria, or if it had properly designed the shoulders and embankments, it had failed to maintain them in accordance with that criteria. Mr. Evans acknowledged at trial that the 1955 DOTD standards (and 1954 AAHSTO standards regarding embankment slope) would not be applicable to a 1959 overlay and that if the roadway was hard surfaced prior to 1954/1955 those standards would not be applicable. He further testified that the state was not required to reconstruct the highway to meet any change in the standards. (R 462-463).

Unfortunately, Mr. Evans discovered at trial for the first time that Highway 552 had originally been Highway 477 and had been renumbered 552 in the early 1950's. The

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and the guidelines the American Association of State Highway and Transportation Officials formulated in 1954. The state adopted overlay standards in 1974. (R 821).

road (as Highway 477) had initially been hard surfaced in 1948 and 1949. On learning at trial that the road had been first hard surfaced in 1948, he acknowledged the inapplicability of the 1955 and 1954 standards but that he believed that there were 1946 guidelines that were applicable. However, he had not researched the case in regards to any 1946 guidelines. (R 479). (The inapplicability of any 1946 guidelines, which were never adopted by the state, was established by Mr. Israel's testimony.) (R 823-824).

Mr. Evans acknowledged that the 1948 plans called for a one (1') foot paved shoulder and in his inspection of the roadway he did not notice any places of less than a one (1') foot paved shoulder. (R 478).

He further acknowledged that at a distance of four feet (4') to six feet (6') from the paved surface the slope was recoverable for some approximately three hundred feet (300') from the spot where the driver left the paved surface and that it was only at or near the drainage culvert where the car began to flip that the slope became unrecoverable. (R 465-466).

The importance of that testimony is that by all the evidence considered the car did not stray from a distance of four feet (4') to six feet (6') until it reached that area close to the ditch. That is, that for some three hundred feet (300') or so it had traveled down the side of the roadway, with the tires on the driver's side of the car on the roadway and the passenger side tires on the area adjacent to the paved surface. The plaintiffs' own expert testified that the slope in this area was recoverable. Combined with the lack of evidence of any defect in the area

adjacent to the paved area, there was no reason why a sober, non-speeding driver could not have completely reentered the paved roadway without problem at any point prior to encountering the ditch area.

Dr. Joseph Blaschke testified as an expert in highway design, traffic engineering, and accident reconstruction for the State. His testimony supported that of Mr. Israel as to the applicable standards. He further testified that there were no defects in the shoulder area based upon his review of the accident report, the deposition testimony of Mr. Evans and his own inspection of the accident site. (R 834-836).

In short, there was no evidence that the State of Louisiana was required to have any more than a one foot (1') paved shoulder on this highway, there was no evidence that the area adjacent to the roadway upon which the vehicle traveled was deficient in any way, there was no evidence that the State of Louisiana failed to properly maintain the roadway or the adjacent area, or that any failure to maintain the area adjacent to the roadway created any defect that in anyway contributed to this accident.

As the Second Circuit Court of Appeals correctly noted, the jury erred in not finding the accident to have been solely the fault of Ronnie Powell.

The testimony clearly established that the driver was intoxicated and speeding and that caused him to leave the road and not be able to recover:

> *Ms. Joy Frith testified that she told Powell that he should not drive, he agreed, and that if she had*

known he was going to drive she would have called his mother or wife to talk him out of it. (R 483, 488).

Billy Harold Rogers testified that he spent at least thirty (30) minutes with Powell, waiting on medical assistance. During that period of time the driver smelled strongly of alcohol, had slurred speech, and Mr. Rogers was of the opinion that Powell was drunk. Powell initially denied to Mr. Rogers that he had been driving, saying that Ms. Joy had told him he was too drunk to drive so he knew he was not driving at the time of the accident. (R 752).

The plaintiffs all acknowledged that there was an extended "discussion" as to who should drive, with other plaintiffs either offering to drive or being volunteered, with the decisions being made based on their respective assessments as to how much each had to drink. They accounted for the accompanying shouting during this decision making process as being necessary because another plaintiff was hard of hearing. (R 358-359, 510, 566, 588, 624).

The State Trooper testified that in her opinion the vehicle was traveling at a speed of 75 to 80 MPH when it left the highway. (R 433).

Mr. Evans, the plaintiffs' own expert, testified that by his calculations the vehicle was going at least 55 MPH and possibly 65 MPH when it left the roadway. (R 448).

Dr. Blaschke, the expert called by the state, testified that the speed of the vehicle was between 60 and 80 MPH when it left the roadway. (R 830).

The driver's blood alcohol level two hours after the accident was .15 and was estimated back by Dr. David Rhone to have been .19 at the time of the accident. (Rhone Deposition Testimony read into evidence)

> *A person with any level of alcohol above .04 would be impaired and that this driver would have been exhibiting signs of impairment that would have been obvious to individuals paying attention. (Rhone Deposition Testimony read into evidence)* (R 831).

It is beyond doubt that the intoxication of the driver and the excessive speed were the sole causes of this accident. The assertions of the plaintiffs to the contrary are unsubstantiated by the evidence, defy common sense, and are beyond reason.

It should also be noted that the Second Circuit Court of Appeals did not consider one issue raised on appeal by the State.

As evidenced at trial, the driver and all five passengers had been drinking. The state sought to introduce as evidence that the driver Ronnie Powell had two previous pleas of guilty to Driving While Intoxicated and a plea of guilty to Disturbing the Peace – Intoxication, that the plaintiff Danny Powell had four previous pleas of guilty to Driving While Intoxicated, that the plaintiff Addison Jack Worthington had a previous plea of guilty to Driving While Intoxicated, and that the plaintiff Tony Dean Mullins had a previous plea of guilty to Driving While Intoxicated.

Additionally, Ronnie Powell was charged with and entered a plea of guilty to the offenses of Driving While Intoxicated and Negligent Injury arising out of the accident involved in this lawsuit.

Prior to trial, the plaintiffs filed a Motion in Limine, opposing the introduction of any of the pleas of guilty. The District Court in response ruled that the pleas of

guilty to the Driving While Intoxicated and Negligent Injury offenses arising out of the accident were not excluded but that the evidence of the other nine pleas of guilty by the plaintiffs were not admissible as they were too prejudicial.

The State of Louisiana believes that these pleas were admissible and probative of the grossly negligent actions of the driver, the knowledge by all the plaintiffs of the risks of harm involved in their conduct, and the conscious indifference of all the plaintiffs to the consequences of their actions. Further, it was necessary that the jury hear this evidence to appropriately judge the liability of all parties. Should this Court grant writs, the State would reargue this issue for consideration.

CONCLUSION

For the foregoing reasons, review by this Court is not necessary or appropriate and the writ of certiorari should not issue.

Respectfully submitted,

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APPENDIX

UNITED STATES SUPREME COURT RULE 10

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

UNITED STATES SUPREME COURT RULE 13

Rule 13. Review on Certiorari: Time for Petitioning

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, e.g., 28 U.S.C. s 2101(c).

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. A suggestion made to a United States court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of this Rule unless so treated by the United States court of appeals.

4. A cross-petition for a writ of certiorari is timely when it is filed with the Clerk as provided in paragraphs 1, 3, and 5 of this Rule, or in Rule 12.5. However, a conditional cross-petition (which except for Rule 12.5 would be untimely) will not be granted unless another party's timely petition for a writ of certiorari is granted.

5. For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified. The application must be received by the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances. For the time and manner of presenting the application, see Rules 21, 22, 30, and 33.2. An application to extend the time to file a petition for a writ of certiorari is not favored.

LOUISIANA SUPREME COURT RULE IX

RULE IX. REHEARINGS

Section 1. An application for rehearing must be filed with the clerk on or before the fourteenth calendar day after the mailing of the notice of judgment, and no extension of time therefor will be granted. Nine copies of the application shall be filed with the original. A copy of the application shall be mailed or delivered to opposing counsel.

Section 2. An application for rehearing properly mailed on or before the last day of the delay shall be deemed timely filed. If the application is received by mail on the first legal day following the expiration of the delay, there shall be a rebuttable presumption that it was timely filed. In all cases where the presumption does not apply, the timeliness of the mailing shall be shown only by an official United States postmark or by official receipt or certificate from the United States Postal Service made at the time of mailing which indicates the date thereof. For the purpose of this rule, the term "by mail" applies only to the United States Postal Service.

Applications forwarded by private delivery or courier service shall be deemed timely filed only if received by the clerk on or before the last day of the delay for filing.

Section 3. If the applicant for rehearing desires further time for filing of brief in support of his application, he shall request additional time in his application and the court may grant or refuse such delay in its discretion.

Section 4. When a rehearing is granted, the case may be specially fixed for argument. When called, the case may be argued orally, on the briefs already filed, with such additional or supplemental briefs as the parties may see fit to file before the argument and resubmission of the case on rehearing. When a rehearing is granted, the court may order it submitted on the briefs previously filed and such supplemental briefs as the parties may wish to file.

Section 5. When a case has been decided on rehearing, another application for rehearing will not be considered unless the applicant has not theretofore applied for and been granted a rehearing or unless the court, in deciding the case on rehearing, has expressly reserved to the unsuccessful party or parties the right to apply for another rehearing.

Section 6. An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ, or when the judgment of this court is merely overruling a motion to dismiss an appeal or a motion to recall or rescind a rule nisi, or when, for any reason, the judgment has not finally disposed of the case in this court, or when an election case has been decided as provided by Rule X, Section 5(c).

LOUISIANA CONSTITUTION, 1974, ARTICLE V, § 10

§ 10. Courts of Appeal; Jurisdiction

Section 10. (A) Jurisdiction. Except as otherwise provided by this constitution, a court of appeal has appellate jurisdiction of (1) all civil matters, including direct review of administrative agency determinations in worker's compensation matters as heretofore or hereafter provided by law, (2) all matters appealed from family and juvenile courts, and (3) all criminal cases triable by a jury, except as provided in Section 5, Paragraph (D)(2) of this Article. It has supervisory jurisdiction over cases which arise within its circuit.

(B) Scope of Review. Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts. In the review of an administrative agency determination in a worker's compensation matter, a court of appeal may render judgment as provided by law, or, in the interest of justice, remand the matter to the administrative agency for further proceedings. In criminal cases its appellate jurisdiction extends only to questions of law.

(c) Other Criminal Matters. In all criminal cases not provided for in Paragraph (D)(2) or Paragraph (E) of Section 5 or Paragraph (A)(3) of this Section, a defendant has a right of appeal or review, as provided by law.

LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 159

Art. 159. Recusation of supreme court justice

When a written motion is filed to recuse a justice of the supreme court, he may recuse himself or the motion shall be heard by the other justices of the court.

When a justice of the supreme court recuses himself, or is recused, the court may (1) have the cause argued before and disposed of by the other justices, or (2) appoint a judge of a district court or a court of appeal having the qualifications of a justice of the supreme court to act for the recused justice in the hearing and disposition of the cause.

LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 2164

Art. 2164. Scope of appeal and action to be taken; costs

The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 2166

Art. 2166. Rehearing, court of appeal judgment; finality; stay

A. Within fourteen days of the mailing of the notice of the judgment and opinion of the court of appeal, a party may apply to the court of appeal for a rehearing. Within thirty days of the mailing of the notice of the judgment and opinion of the court of appeal, a party may apply to the supreme court for a writ of certiorari. The judgment of a court of appeal becomes final and definitive if neither an application to the court of appeal for rehearing nor an application to the supreme court for a writ of certiorari is timely filed.

B. If any party files a timely application to the court of appeal for a rehearing, then the time within which any other party may apply to the supreme court for a writ of certiorari shall be extended until thirty days of the mailing of the notice of a denial of rehearing.

C. If a timely application for rehearing has been filed in the court of appeal and the court of appeal denies the application, the judgment becomes final and definitive unless an application for writ of certiorari to the supreme court is filed within thirty days of the mailing of the notice of a denial of rehearing.

D. If an application for certiorari to the supreme court is timely filed, a judgment of the court of appeal becomes final and definitive when the supreme court denies the application for certiorari. The supreme court may stay the execution of the judgment of the court of

appeal pending a timely application for certiorari or an appeal to the United States Supreme Court.